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No. 87-1093

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ETIENNE BOERENVEEN,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PETITIONER'S REPLY BRIEF

ARGUMENT

The Petition urges that this Court should require a more stringent standard than the trial court's exercise of judicial discretion in determining motions for severance in criminal prosecutions in light of *United States v. Inadi*, 475 U.S. 386 (1986) and *Bourjaily v. United States*, 107 S.Ct. 2775 (1987) and the Sixth Amendment's Compulsory Process Clause.

Opposing the Petition, the United States argues that "[t]he district court properly found the proffer of Heyman's testimony in this case to be inadequate" (*Brief in Opposition* at Page 9)

and that "[neither] *Inadi* nor *Bourjaily* altered the test for granting a severance in a conspiracy case" and that "neither case is remotely pertinent to the question presented here". (*Brief in Opposition* at Page 10)

As the Petition noted and the record confirms,

> "[d]uring argument of the appeal, the United States Attorney conceded that the trial court erred in denying severance on the basis that Heyman's affidavit 'does not contain specific exonerative facts which would warrant a severance' . " (*Petition* at Page 6, Footnote)

Thus, although irrelevant since Petitioner does not seek review of whether or not the trial court properly exercised its discretion under traditional standards for determining severance motions in conspiracy cases, the concession by the United States Attorney finds support in the record that, indeed, the trial court erred in denying Petitioner's severance motion applying the traditional standards.

Turning, then, to that which the Petition seeks to review, while concededly neither *Inadi* nor *Bourjaily* altered the test for determining a severance motion in a conspiracy case, contrary to the *Brief in Opposition* since both decisions substantially altered the prerequisites to admissibility of a conspirator statement under *F.R.E.* Rule 801(d)(2)(e) they implicate the Sixth Amendment's Compulsory Process Clause. Indeed, since *Inadi* and *Bourjaily* held that neither unavailability nor independent indicia of reliability are prerequisites to the admissibility of conspirator statements under *F.R.E.* 801(d)(2)(e), the only means of testing reliability of the conspirator statement admitted against a defendant is by examination or, as this Court observed in *Inadi*, cross-examination of the conspirator declarant.

Thus, as the Florida District Court observed in *Talavera v. State*, 227 So.2d 493, 495 (Fla.Dist.Ct. 1969), *aff'd in part, quashed in part, State v. Talavera*, 243 So. 2d 595 (Fla. 1971),

"the real issue here is the right to compulsory process; and the question of severance is involved only incidentally to the extent that severance may be the only expedient to protect such right."

CONCLUSION

This Court should grant the Petition for a writ of *certiorari* to consider to what extent and in what circumstances the decisions in *United States v. Inadi*, 475 U.S. 386 (1986) and *Bourjaily v. United States*, 107 S.Ct. 2775 (1987) and the Sixth Amendment's Compulsory Process Clause require modification of the traditional standard of the trial court's exercise of discretion in determining severance motions where conspirator statements will be offered under *F.R.E.* Rule 801(d)(2)(e).

Dated: March 9, 1988

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